



Capitol Services, Inc.

110 W. Michigan Ave., Ste 700. Lansing, MI 48933

517.372.0860 Fax 517.372.0723

[www.CapitolServices.org](http://www.CapitolServices.org)

### Comments on SB 293

SB 293, while a well-intentioned attempt to resolve the question of how to dispose of a person's "digital assets" upon his or her death or incapacity, directly conflicts with federal law, would stifle attempts that companies are currently undertaking to address this problem, as well as raise difficult privacy and authentication issues.

As a threshold issue, email service providers ("electronic communications service" providers) are currently prohibited under the federal Electronic Communications Privacy Act (18 U.S.C. 2702) from knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service . . . with[out] the lawful consent of the originator or an addressee or intended recipient of such communication." 18 U.S.C. 2702 (a) (1), (b) (3). Allowing a personal representative to "take control of, conduct or continue" the account of decedent, without the "lawful consent" of the account holder/decedent, directly conflicts with ECPA's prohibition against the disclosure of email, pictures, data, or any other content from a decedent's email or social media account. As such, SB 293 will not only place email providers such as Google, Yahoo! and AOL in the position of having to decide which law to violate but also create a false expectation among Michigan residents that the content of their loved ones' email accounts can be readily accessed, when the clear language under federal law specifically directs the opposite.

In addition ECPA allows third parties, whose privacy may be compromised from such disclosure to pursue civil damages against email and social media providers who knowingly disclose the content of such communications. (18 U.S.C. 2707(a)-- any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate). For example, sensitive personal information of a third party could easily appear in the email communications of other parties, e.g., a mother seeking information from a doctor about her son/daughter's medical condition; mother passes away, fiduciary demands access to email accounts, thereby compromising the secrecy of the son/daughter's medical condition. In addition, some people may take issue with the "continuation" of a decedent's accounts into perpetuity, which could also create unnecessary pain among the decedent's survivors, particularly if the contents of some of the communications are hurtful. Furthermore, without detailed express wishes of the decedent, it will be impossible to discern his or her exact wishes, e.g., all accounts to terminate or some to terminate and others to survive in perpetuity.

SB 293 fails to consider difficult authentication issues that will be faced by email service providers. Such providers need to not only authenticate the identity of the decedent's executor (and that he or she has